87-48 (1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

A. W., a minor, by and through his Father and Next Friend, N.W.;
N.W. and S.W.

Petitioners,

vs.

NORTHWEST R-1 SCHOOL DISTRICT; JOHN GIBSON, in his capacity as Acting Superintendent of the Northwest R-1 School District; THE DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION; STATE BOARD OF EDUCATION; ARTHUR MALLORY, in his capacity as Commissioner of the Department of Elementary and Secondary Education,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Education for All Handicapped Children Act permits state and local educational agencies to deny a handicapped child an appropriate education in the regular public school because they do not have a placement available for him in that setting?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 6, 1987.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 813 F.2d 158 (8th Cir. 1987) and is reprinted in the Appendix hereto at p. A-1.

The opinion of the United States District Court for the Eastern District of Missouri is unreported and is reprinted in the Appendix hereto at p. A-15.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 6, 1987. A timely petition for rehearing with suggestions for rehearing *en banc* was denied on April 8, 1987, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

FEDERAL STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Education for All Handicapped Children Act, 20 U.S.C. §§1412, 1414, and its implementing regulations, 34 C.F.R. §§300.360 - 300.372, 300.550 -300.556, are set forth in the Appendix hereto at p. A-42.

STATEMENT OF THE CASE

This case involves the educational placement of A.W., a handicapped child with Down's Syndrome. Two educational placements were proposed for A.W.: a separate school attended solely by handicapped children and a special class in the regular school setting staffed by a teacher certified to work with trainable severely handicapped children.[1] In the latter placement, A.W. would spend most of the school day with other handicapped children, but would also have the benefits of proximity to his home and exposure to nonhandicapped students of

[1] In Missouri, classroom teachers for severely retarded or severely handicapped children, whether in separate schools or special classes in the regular school, must have certification from the Missouri Department of Elementary and Secondary Education (DESE) in the area of trainable severely handicapped or be eligible for temporary certification.

his own age during lunch, recess, and physical education. *See* p. A-20 of the Appendix hereto.

The placement issue crystallized during the June, 1981 conference to develop A.W.'s individual education plan (IEP) for the next school year. At that meeting, A.W.'s parents requested placement for him in a self-contained class in the local district. The Northwest R-1 district, however, proposed referring A.W. to the Missouri Department of Elementary and Secondary Education (DESE) for placement at State School #2. State School #2 is a day school operated by DESE to serve children who are severely handicapped under Missouri law and reside in Jefferson County, Missouri — the county in which Northwest R-1 is located.[2] State School #2 is some twenty-five miles from A.W.'s home. After reviewing the referral from Northwest, DESE accepted A.W. for state services and proposed placement for him at State School #2.

Neither Northwest R-1 nor DESE had a special or self-contained class available for A.W. in the regular school setting. On his June 1981 IEP, the justification offered by Northwest R-1 for referring A.W. to DESE was that, based on test results and behavioral observations, he needed a special education program for severely retarded children. In this action, Northwest R-1 stipulated that it "refers severely handicapped children

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[2] Missouri law defines "severely handicapped children" as "handicapped children under the age of twenty-one years who because of the extent of the handicapping condition or conditions, as determined by competent professional evaluation, are unable to benefit from or meaningfully participate in programs in the public schools for handicapped children." Mo.Rev.Stat. §162.675(3).

To quantify that definition of severely handicapped, the evaluation team for Northwest R-1 and the state diagnostic review team used the State Plan description of severe or trainable mentally retarded: students who generally perform at a level one-half or less than that of nonhandicapped peers on standardized instruments of cognitive ability and adaptive behavior. *See* p. A-19.

domiciled in its catchment area to DESE for educational services because it does not have a program operative for and available to such children."

In its Jefferson County catchment area, DESE has no special class in the regular school for severely handicapped children of A.W.'s age. "DESE services meant, for A.W., education at State School...#2..., a school...which exclusively educates handicapped children." *See* p. A-16 of Appendix hereto. The state defendants similarly stipulated that: "[t]he State Board of Education and DESE do not operate any program in Jefferson County for the provision of direct educational services for elementary-aged 'severely handicapped' children other than State School No. 2. However, since the opening of the 1981-82 school year, the State Schools for the Severely Handicapped have operated a classroom and program for middle and high school aged 'severely handicapped' children in the Cedar Hill Middle School of Northwest R-1 School District (hereinafter, the Cedar Hill Project)." At the time of his June 1981 IEP, A.W. was six years old and thus elementary school aged.

A.W.'s parents requested a due process hearing when informal review with the district produced no resolution of the placement issue. Missouri law provides for a hearing panel of three persons, all of whom must have knowledge or training in the area of disability involved. Mo. Rev. Stat. §162.961.2. By a unanimous vote, the three-member panel held "the proposed placement of A.W. at State School #2...*not to be appropriate.*' *See* p. A-36 of Appendix hereto (emphasis in original). As the basis for its holding, the panel found that A.W. "has benefited from interaction with non-handicapped peers" and "needs continued interaction with non-handicapped peers." *See* pp. A-34, A-35 of Appendix hereto. The "appropriate program to meet A.W.'s individual needs must include interaction with A.W.'s community and interaction with non-handicapped peers." *See* p. A-36 of Appendix hereto. Placement for him at State School #2 was not appropriate

because it is segregated by enrollment and it is physically isolated." *See* p. A-36 of Appendix hereto. The panel also found that A.W. was severely handicapped within the meaning of Mo. Rev. Stat. §162.675(3) and, although placement at State School #2 was not appropriate, DESE was responsible for his education. *See* p. A-36 of Appendix hereto.

When the state-level reviewing officer set aside the panel's decision because DESE had not been a party to the hearing, A.W.'s parents filed this action in federal district court. They claimed that the proposed placement for A.W. in State School #2 would deny his right to a free appropriate public education in the least restrictive environment under the Education for All Handicapped Act, 20 U.S.C. §§1400 *et seq.*, the Rehabilitation Act, 29 U.S.C. §794, and the Equal Protection Clause. The district court's jurisdiction to hear these claims was based on 28 U.S.C. §§1331, 1343(3) and (4); 20 U.S.C. §1415; and 29 U.S.C. §794a.

After a five-day bench trial, the district court on February 3, 1986 entered judgment against plaintiffs on all their claims.[3] Although the court found that the mainstreaming provisions of the Education Act clearly apply to children such as A.W. who are severely handicapped under Missouri law and cannot be placed in regular classrooms, it concluded that the mainstreaming directive did "not require the placement of A.W. in a self-contained class in the House Springs Elementary School."[4] *See*

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[3] Between trial and entry of the district court's final judgment, the parties agreed to a mutual waiver of their procedural claims and defenses — plaintiffs' claim that their state-level review was not impartial and defendants' contention that DESE should have been a party to the due process hearing.

[4] The analogous Missouri mainstreaming statute provides that "handicapped and severely handicapped children shall be educated along with children who do not have handicaps" to the maximum extent practicable. Mo. Rev. Stat. §162.680.2.

pp. A-19, A-21, A-23 of Appendix hereto. "The specific difficulty with placement at the House Springs School is that there is no teacher there who is certified to teach severely retarded children like A.W." *See* p. A-24 of Appendix hereto. Requiring DESE to move a teacher from State School #2 to provide a program at House Springs would increase the teacher-student ratio at State School #2. Since A.W. could receive an appropriate education in the existing program at State School #2, the fact that he could in addition receive some minimal benefit from exposure to his nonhandicapped peers in the regular school setting was insufficient to justify a reduction in benefits to other handicapped children. *See* p. A-24 of Appendix hereto.

The Court of Appeals for the Eighth Circuit affirmed the decision of the trial court. It held that "to the maximum extent appropriate" was a limitation on the mainstreaming provision which permitted the court to consider the cost to Northwest R-1 of providing an integrated placement. *See* p. A-10 of Appendix hereto. To construe the mainstreaming provision as plaintiffs urged — as requiring educational agencies to have a placement available to the extent necessary to implement the IEP of each handicapped child and to place each child in the most integrated setting in which he can receive an appropriate education — would intrude upon questions of educational methodology left to state and local educational agencies in cooperation with parents or guardians. *See* pp. A-11, A-12 of the Appendix hereto.

On April 8, 1987, the Eighth Circuit denied plaintiffs' Petition for Rehearing with Suggestion for Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

In this case, the Eighth Circuit has announced a rule governing the mainstreaming requirement of the Education Act which would deprive handicapped children of their right to receive an education in regular schools even when they can receive an appropriate education there. This rule permits educational agencies to place a handicapped child in a separate, handicapped-only school simply because they would have to hire a teacher to provide him an appropriate education in the regular school. The decision of the Eighth Circuit is contrary to decisions of this Court as well as to the text of the statute, its legislative history, and the implementing regulations.

The right of handicapped children to receive their education, to the maximum extent appropriate, with children who are not handicapped is a basic guarantee of the Education Act. The scope of that guarantee is an important federal question which has not been, but should be, settled by this Court. The rule announced by the Eighth Circuit conflicts with decisions of this Court which have found that the term "appropriate" in the Education Act has reference to the individual handicapped child, focusing on whether the instruction, related service, or setting is fitting for the particular needs of each child. *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176 (1982); *Burlington School Committee v. Department of Education,* 471 U.S. 359 (1985). The decision in this case transforms that child-centered inquiry into an agency-centered analysis, focusing on whether the mainstreamed placement is feasible for the educational agency.

A clear conflict also exists between the Sixth and Eighth Circuits regarding whether the cost of placement availability will excuse compliance with the mainstreaming requirement. In *Roncker v. Walter,* 700 F.2d 1058 (6th Cir.), *cert. denied,* 464 U.S. 864 (1983), the Sixth Circuit concluded that cost is no defense if an educational agency has failed to provide a proper

continuum of alternative placements because having such placements available will benefit all handicapped children. The Eighth Circuit in this case found that the cost of hiring a teacher to make a placement available in the regular school was a sufficient justification for assigning a handicapped child to a segregated school.

I. The Decision Below Conflicts With This Court's Decisions Adopting a Child-Centered Approach to the Appropriate Education and Placement Provisions of the Education Act.

This Court has recognized that the mainstreaming provision is a substantive requirement of the Education Act. "States receiving money under the Act . . . 'to the maximum extent appropriate' must educate handicapped children 'with children who are not handicapped.' " *Board of Education v. Rowley,* 458 U.S. at 180-181, quoting 20 U.S.C. §1412(5)(B). Compliance with the mainstreaming is thus a condition on the receipt of Education Act funds. While the Court has counselled judicial deference to state and local officials on questions of educational methodology, it has also distinguished between those discretionary "questions of methodology" and judicial determinations "that the requirements of the Act have been met." *Id.* at 208. As in *Tatro* which involved compliance with the Act's related service requirement, "[j]udicial review is equally appropriate in this case which presents the legal question of a school's substantive obligation" under the mainstreaming requirement. *Irving Independent School District v. Tatro,* 468 U.S. 883, 890 n.6 (1984).

The mainstreaming obligation is a requirement of the Education Act separate and distinct from the guarantee of a free appropriate public education. Compliance with the free appropriate public education requirement therefore does not automatically constitute or substitute for compliance with the mainstreaming directive. This Court has noted that an inap-

propriate education in a regular school placement will not satisfy the Act's requirements, and the reverse is equally true. "The Act contemplates that...[a free appropriate public] education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools at public expense where this is not possible." *Burlington School Committee v. Department of Education,* 471 U.S. at 369. Just as opportunities for mainstreaming cannot cure an inappropriate education, so an appropriate education in a segregated setting will not excuse a failure to mainstream when the child can also receive an appropriate education in the regular public school.

The question, then, is the scope of the Act's requirement to mainstream "to the maximum extent appropriate." While this Court has observed that "appropriate" is not a term of art in the Education Act, its decisions have consistently found that term to have in view the particular educational needs of the individual handicapped child. In *Rowley,* the Court held that an appropriate education is "access to specialized instruction and related services...individually designed to provide educational benefit to the handicapped child." *Board of Education v. Rowley,* 458 U.S. at 201. The *Rowley* Court also noted that, when used to describe an educational setting, the term "appropriate" focused on whether the setting was a suitable environment for the handicapped child's education. *Id.* at 197 n.21. Similarly, in determining whether reimbursement for private school tuition was "appropriate" relief under the Act, this Court concluded that "the only possible interpretation is that the relief is to be 'appropriate' in light of the" statutory purpose of providing a free appropriate public education. *Burlington School Committee v. Department of Education,* 471 U.S. at 369.

The text and legislative history of the mainstreaming requirement define its scope in terms of the educational needs of the in-

dividual handicapped child. According to the Senate Report on the Education Act, the mainstreaming directive added by the 1974 amendments requires the "provision of educational services in the least restrictive environment appropriate to the needs of the handicapped child." S. Rep. No. 94-168, p. 3, U.S. Code Cong. & Admin. News 1975, p. 1427. Section 1412(5)(B) itself frames the scope of its requirement to mainstream to the maximum extent appropriate. It specifies only one exception to the requirement and that is when the child's needs are such that he cannot achieve a satisfactory education in the regular school with supplementary aids and services. 20 U.S.C. §1412(5)(B).

By its own terms, section 1412(5)(B) makes clear that a handicapped child must be educated with nonhandicapped children to the maximum extent without sacrificing his right to an appropriate education. "To the maximum extent" refers to the Act's cascade or continuum of placements and "the extent to which such child is to be integrated into the regular...school program of non-handicapped children." S. Rep. No. 94-168, p. 42, U.S. Code Cong. & Admin. News 1975, p. 1465. The obligation to mainstream to the "maximum extent appropriate" thus requires that a handicapped child be educated in the most integrated setting in which he can receive an appropriate education.

The decisions of this Court do not support the conclusion of the court below that cost can excuse a failure to comply with the mainstreaming requirement. Rather, the Court's decisions distinguish between the requirements of the Act and special services in excess of the statute's basic guarantees. In *Rowley,* the special services of a sign-language interpreter exceeded the substantive requirement of a free appropriate public education and the state was not obligated to provide such services. *Board of Education v. Rowley,* 458 U.S. at 209-210. However, the *Burlington* Court found it "clear beyond cavil" that the Act required placement in a private school at public expense when

placement in the regular school was not possible. *Burlington School Committee v. Department of Education,* 471 U.S. at 370. The obligation to educate handicapped children with nonhandicapped children to the maximum extent appropriate is expressly phrased as a condition for a state to receive funds under the Act. *See* 20 U.S.C. §1412; S. Rep. No. 94-168, p. 16, U.S. Code Cong. & Admin. News 1975, pp. 1440-1441; *see also Irving Independent School District v. Tatro,* 468 U.S. at 891 n.8. Cost cannot justify a failure to provide that basic guarantee of the Act.

II. The Decision Below Conflicts with a Decision of the Sixth Circuit Refusing to Allow the Cost of Providing a Placement to Excuse a Failure to Mainstream.

The decision in this case conflicts with the feasibility analysis developed by the Sixth Circuit in *Roncker v. Walter,* 700 F.2d at 1063. The Sixth Circuit analyzed two kinds of costs in that mainstreaming case — the cost of the placement and the cost of special services.[5] The *Roncker* court concluded that, while cost is a relevant consideration in determining whether special services should be provided to improve a child's performance, the cost of having the placement available for the child is not a proper factor. "Cost is no defense...if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children. The provision of such placements benefits all handicapped children." *Id.*

The Sixth Circuit's position on the cost of placement is consistent with the Act and its implementing regulations. *See* 20 U.S.C. §§1401(16), 1412(5)(B). The regulations require that the continuum of placements — instruction in regular classes,

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[5] Despite the fact that educational placement is the issue in this case, the Eighth Circuit used the *Roncker* paradigm for special services to obtain a result directly in conflict with the *Roncker* conclusion on the cost of providing a mainstreamed placement.

special classes, special schools, institutions, hospitals and home — must be available for the placement of each child in line with his individual needs. The continuum requirement is not a systematic question, as the Eighth Circuit characterized it. *See* p. A-12 of Appendix hereto. Rather, it is applicable to the placement decision of each individual handicapped child. "Each public agency shall insure that...[t]he various alternative placements included under 300.551 are available to the extent necessary to implement the individualized education program of each handicapped child.... 34 C.F.R. §300.552.

Both the school district and DESE stipulated in this case that they do not have available for A.W. or other severely handicapped children of his age-level a special class in the regular school setting. *See supra,* pp. 3 - 4.

As the Sixth Circuit recognized, having the various alternative placements available will benefit all handicapped children. For A.W.'s parents and his IEP committee, there was only one placement option — the existing handicapped-only school. However, when a special class for severely retarded students is available in the continuum, the IEP committee for every other such student can base its placement decision on the individual student's capabilities.

CONCLUSION

The Court should review this case because the scope of the mainstreaming requirement is a matter of substantial public importance and concern. Congress found that more than "one million of the handicapped children in the United States are excluded entirely from the public system and will not go through the educational process with their peers." 20 U.S.C. §1400(b)(4). Allowed to stand, the decision of the Eighth Circuit in this case means that many of those children will continue to be denied access to regular schools. They will be denied such access not because they cannot receive an appropriate education in the public schools, but because their school officials choose not to expend funds to develop classes for them in the regular school setting.

Too often, handicapped children and their parents have been told that sufficient funds are not available to meet their educational needs. Congress enacted the Education Act and has provided generous grants to state and local educational agencies to assure that handicapped children are not denied their educational rights. 20 U.S.C. §1400(c). The right of handicapped children to be educated with children who are not handicapped to the maximum extent appropriate to their needs is one of the principal rights which Congress intended to guarantee and protect.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1541

A.W., a minor by and through his Father and Next Friend, N.W.; N.W. and S.W.,

Appellants,

v.

Northwest R-1 School District; John Gibson, in his capacity as Acting Superintendent of the Northwest R-1 School District; The Department of Elementary and Secondary Education; State Board of Education; and Arthur Mallory in his capacity as Commissioner of the Department of Elementary and Secondary Education,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 14, 1986

Filed: March 6, 1987

Before JOHN R. GIBSON, FAGG, and MAGILL, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

This appeal requires us to interpret the mainstreaming provisions of the Education of All Handicapped Children Act, 20 U.S.C. §§ 1401-1461 (1982) ("the Act"). A.W., a handicapped child, and his parents appeal the judgment of the district court[1] denying their request for declaratory and injunctive relief against the Northwest R-1 School District and various educational agencies and officials of the State of Missouri. They seek to have A.W. placed in House Springs Elementary School, located in Northwest R-1, rather than in State School No. 2, a school designed for and which exclusively educates handicapped children. The district court found that A.W. was severely mentally retarded and would only minimally benefit from placement in House Springs. The court concluded that the mainstreaming provisions of the Act do not require A.W.'s placement in House Springs. A.W. argues that the district court misinterpreted the Act's mainstreaming provisions by considering the cost to Northwest R-1 of providing a special teacher at House Springs for A.W. and by considering A.W.'s ability to benefit from placement in House Springs. We affirm the judgment of the district court.

A.W. is an elementary school-aged boy with Down's syndrome. The trial court found that he functions within the range of severe mental retardation and has only minimal self-care abilities. He has difficulty dressing himself, using the restroom, and washing himself. He must be closely supervised at all times and his behavior is sometimes disruptive. A.W.'s ability to express himself is extremely limited. His vocalizations are very difficult to understand and usually consist of one- or two- word expressions. He does not grasp the abstract concept of numbers, and he has only partially mastered the alphabet. Bas-

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[1] The Honorable Edward L. Filippine, United States District Judge for the Eastern District of Missouri.

ed on the results of numerous standardized tests and the other evidence presented, the trial court concluded that A.W. "clearly functions at or below one-half of the level expected of children of his age and is 'severely handicapped' under [Mo. Rev. Stat. § 162.675(3) (1978)]."[2]

In May of 1980, A.W.'s mother attempted to enroll him in Northwest R-1 at House Springs Elementary School. Northwest R-1 recommended that he be schooled at a private institution, and then referred A.W. to the Missouri Department of Elementary and Secondary Education for evaluation and services. After extensive testing, the Department concluded that A.W. was severely handicapped within the meaning of section 162.675(3) and was eligible for placement in State School No. 2 in Mapaville, a school exclusively attended by and designed for handicapped children.

A.W.'s parents challenged his classification as "severely handicapped" and objected to his placement in the segregated environment of State School No. 2 through the procedure for agency appeals set forth in Mo. Rev. Stat. §§ 162.950, 162.961,

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[2] Section 162.675(3) of the Missouri Revised Statutes defines the term "severely handicapped children" as "Handicapped children under the age of twenty-one years who, because of the extent of the handicapping condition or conditions, as determined by competent professional evaluation, are unable to benefit from or meaningfully participate in programs in the public schools for handicapped children." The Missouri Department of Elementary and Secondary Education is charged with determining whether children are eligible for services within the state schools for the severely handicapped. Mo. Rev. Stat. § 162.735. Under the Department's guideline, a severely mentally retarded child is "severely handicapped," and thus eligible for placement in a state school, if he "perform[s] on measures of intelligence, social skills, adaptive behavior, and self-care skills at a level one-half or less than that of normal students of equivalent age and ethnic-cultural background when measured by like standardized instruments of cognitive ability and adaptive behavior." Defendants' Exhibit Y at 179.

and 162.962 (1978).[3] At the level of review commonly referred to as the due process hearing, *see* 20 U.S.C. § 1415(b)(2), a three-person panel heard evidence presented by A.W.'s parents and by Northwest R-1 and concluded that A.W. was "severely handicapped." The panel also concluded, however, that it was inappropriate to place A.W. in State School No. 2 and that an appropriate educational program for A.W. must include interaction with A.W.'s nonhandicapped peers. A.W.'s parents continued the appeal process to the State Board of Education. The Board's designated representative affirmed the panel's conclusion that A.W. Was severely handicapped, but reversed its decision regarding the appropriate placement of A.W. because this determination was beyond the scope of the due process panel's authority. The Board representative ruled that A.W. should be placed in State School No. 2.

A.W. and his parents then brought this action in the district court under 20 U.S.C. § 1415(e)(2). They sought declaratory and injunctive relief against Northwest R-1 and its Superintendent, John Gibson; the Department of Elementary and Secondary Education and its Commissioner, Arthur Mallory; and the State Board of Education. Once again, they challenged A.W.'s classification as severely handicapped. They also sought an injunction against his placement in State School No. 2 and a declaration that the Act's mainstreaming provisions required A.W.'s placement in House Springs Elementary School.[4] The

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[3] These sections are responsive to the requirement that states receiving federal funds under the Act create "procedural safeguards" to ensure that handicapped children receive appropriate free public education. 20 U.S.C. § 1415. The parties waived by stipulation any claim that these procedures were not complied with or that these procedures did not satisfy due process.

[4] A.W. seeks to be placed in a special, self-contained classroom at House Springs with a teacher trained to meet his exceptional educational needs. Interaction with his nonhandicapped peers would principally take place during recess, lunch, and gym class.

parties waived by stipulation any claim that they failed to exhaust administrative remedies or that A.W. was not given a full and fair opportunity to be heard before an impartial tribunal at each step of the review process.

After a five-day bench trial, the district court entered judgment against A.W. and his parents. The court first found that A.W. was severely handicapped within the meaning of Mo. Rev. Stat. § 162.675(3). The court noted that A.W.'s classification was not dispositive because the Act requires that handicapped children be educated along with nonhandicapped children "to the maximum extent appropriate." 20 U.S.C. § 1412(5); *see also* Mo. Rev. Stat. § 162.680.2 (handicapped and nonhandicapped children should be educated together "to the maximum extent practicable"). In determining whether the Act's requirements had been met, the court employed the analyses set forth by the Supreme Court in *Board of Education v. Rowley,* 458 U.S. 176, 206-07 (1982), and by the Sixth Circuit in *Roncker v. Walter,* 700 F.2d 1058, 1063 (6th Cir.), *cert. denied,* 464 U.S. 864 (1983).

The court determined that State School No. 2 provided A.W. with an appropriate public education as defined in *Rowley.* Then the court considered whether, given that State School No. 2 was an appropriate placement for A.W., the Act's mainstreaming provisions nonetheless required that A.W. be placed in House Springs. It held that the Act did not. The trial court observed that the nature of A.W.'s handicap was such that his interaction with his nonhandicapped peers would be limited to mere observation[5] and concluded that:

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[5] The trial court found the following:

> [B]ecasue [sic] of A.W.'s severe retardation the exposure to non-handicapped children if placed at House Springs would include only the opprotunity [sic] to observe, rather than participate with, non-handicapped children on the bus ride to

> In light of the minimal benefit A.W. would receive from placement in House Springs, the Court finds that the placement is not feasible. The specific difficulty with placement at the House Springs School is that there is no teacher who is certified to teach severely retarded children like A.W. The addition of a teacher is not an acceptable solution here since the evidence before the Court shows that the funds available are limited so that placing a teacher at House Springs for the benefit of a few students at best, and possibly only A.W., would directly reduce the educational benefits provided to other handicapped students by increasing the numer of students taught by a single teacher at [State School No. 2]. The Court finds that although the plaintiff presented evidence that A.W. might benefit from exposure to nonhandicapped peers, this possible benefit is insufficient to justify a reduction in unquestioned benefits to other handicapped children which would result from an inequitable expenditure of the finite funds available.

A.W., slip op. at 12. The court entered its judgment in favor of the state and local defendants.

> school, at lunch, at recess and in activities such as physical education. The testimony of A.W.'s elementary school instructors at the due process hearing and at trial showed that A.W. has only limited interaction with others. The interaction that does exist is primarily directed to those to whom A.W. is close or partieularly familiar. A.W. seldom mimics the behavior of other students. Further, although it would be physically possible to provide most of the [State School No. 2] programs at House Springs Elementary, some of the special features of that school which would meet A.W.'s needs, the bathrooms adjacent to each room and the simulated grocery store, bedroom and kitchen, would not transfer to House Springs.

A.W. v. Northwest R-1 School Dist., No. 82-350-C-2, slip op. at 11-12 (E.D. Mo. Feb. 3, 1986).

On appeal, A.W. and his parents take issue with the trial court's interpretation of the mainstreaming provisions of the Act, contending that the court erred in considering the benefit to A.W. of placement in House Springs and the cost of such placement to Northwest R-1. They also contend that the trial court erred in refusing to re-open and modify its judgment in light of additional evidence probative of A.W.'s ability to benefit from placement in House Springs.

I.

The Education for All Handicapped Children Act provides federal money to assist state and local agencies in educating handicapped children. *See* 20 U.S.C. §§ 1401-1461. Receipt of this money is conditioned on the state's compliance with procedures and guidelines calculated to "[assure] all handicapped children the right to a free appropriate public education." *Id.* § 1412(1). Included are the requirements that individualized educational programs be developed for each handicapped child, *id.* § 1041(18), and that this program be reviewed annually. *Id.* § 1414(a)(5). The Act also requires that the state develop procedural safeguards to assure the proper classification of handicapped children and to permit administrative and judicial review of this classification and consequent educational placement. *Id.* § 1415. Congress, in enacting this legislation, found that "one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers." *Id.* § 1400(b)(4).

For our present purposes, the most important provision of the Act is section 1412(5), which provides that "to the maximum extent appropriate, handicapped children * * * are to be educated with children who are not handicapped, and that * * * removal of handicapped children from the regular educational environment [should occur] only when the nature or severity of the handicap is such that education in regular classes with use of supplementary aids and services cannot be achieved satisfactori-

ly." *Id.* § 1412(5). This requirement is known as "mainstreaming." *Mark A. v. Grant Wood Area Educ. Agency,* 795 F.2d 52, 54 (8th Cir. 1986). It is also referred to as the "least restrictive environment" in the federal regulations implementing the Act. 34 C.F.R. § 300.550-.556 (1986). These regulations repeat the above statutory language, *id.* § 300.550, and further require that each state receiving funds pursuant to the Act establish a "continuum of alternative placements" for handicapped children including the opportunity for education in "regular classes, special classes, [and] special schools." *Id.* § 300.551(b)(1). Missouri has enacted analogous legislation addressing mainstreaming. *See* Mo. Rev. Stat. § 162.680.2 (1978).[6]

This statutory framework reveals the strong congressional preference for mainstreaming. *See Board of Educ. v. Rowley,* 458 U.S. 176, 181 n.4 (1982); *Mark A.,* 795 F.2d at 54; *Springdale School Dist. #50* v. Grace, 693 F.2d 41, 43 (8th Cir. 1982), *cert. denied,* 461 U.S. 927 (1983). This congressional preference, however, is not absolute. "Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. * * * The Act [itself] provides for the education of some handicapped children in separate or institutional settings." *Rowley,* 458 U.S. at 181 n.4; *see* 20 U.S.C. § 1412(5) ("nature or severity of the handicap [may be] such that education in the regular classroom cannot be achieved satisfactorily").

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[6] The Missouri statute provides:

> To the maximum extent practicable, handicapped and severely handicapped children shall be educated along with children who do not have handicaps and shall attend regular classes. Impediments to learning and to the normal functioning of such children in the regular school environment shall be overcome whenever practicable by the provision of special aids and services rather than by separate schooling for the handicapped.

Mo. Rev. Stat. § 162.680.2 (1978).

As the district court correctly observed, the Supreme Court in *Rowley* articulated a two-part test for compliance with the Act. "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-07 (footnotes omitted). The parties stipulated before trial that the procedural requirements of the Act had been satisfied, thus answering the first of these two questions. *A.W.*, slip op. at 8; Designated Record at 105-10. As to the second question, the district court observed that the Court in *Rowley* was not directly addressing the issue of mainstreaming.[7] Therefore, it looked to the Sixth Circuit's opinion in *Roncker*, 700 F.2d at 1058, for guidance. The Sixth Circuit identified the following factors as relevant to the mainstreaming issue:

> In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of

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[7] Although the district court did not explicitly answer the second part of the *Rowley* test, the court did find that State School No. 2 provided A.W. with an appropriate free education as defined in *Rowley*. *A.W.*, slip op. at 10. The Supreme Court held that the appropriate free education requirement is satisfied if the state provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Rowley*, 458 U.S. at 203. However, this definition assumes compliance with the other requirements of the Act, *id.* at 204, including the mainstreaming requirement. We are thus led back to the principal issue raised on this appeal. In any event, A.W. and his parents do not seriously dispute the district court's finding that placement at State School No. 2 would be appropriate for A.W., *i.e.*, he would derive educational benefit therefrom, *apart from* the issue of compliance with the mainstreaming requirement.

> mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities * * * because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting. Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children.

Id. at 1063 (citations omitted). The district court quoted this passage from *Roncker,* and modeled its ultimate conclusion—that the marginal benefit of A.W.'s mainstreaming was outweighed by the deprivation of benefit to other handicapped children—on this language. *A.W.,* slip op. at 12.

We are satisfied that the district court properly analyzed A.W.'s claim. We believe that the Sixth Circuit in *Roncker* correctly interpreted the Act's mainstreaming provisions as allowing a court to consider both cost to the local school district and benefit to the child. This interpretation is consistent with the language of 20 U.S.C. § 1412(5), which significantly qualifies the mainstreaming requirement by stating that it should be implemented "to the maximum extent *appropriate,*" 20 U.S.C. § 1412(5) (emphasis added), and that it is inapplicable where education in a mainstream environment "cannot be achieved *satisfactorily.*" *Id.* (emphasis added). It is consistent with the Supreme Court's conclusion in *Rowley* that the Act does not require states to provide each handicapped child with the best *possible* education at public expense, 458 U.S. at 188-89, and the Court's recognition that available financial resources must be equitably distributed among all handicapped children. *Id.* at 193 n.15. It is also consistent with our earlier interpretations of the Act,[8] *Mark A.,* 795 F.2d at 54; *Springdale School Dist.,* 693

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[8] In *Mark A.,* we held that the Act did not require the state to pay for the best possible education for a handicapped child. 795 F.2d at 54. Mark's parents sought to have him placed in an integrated classroom in a private school. The local educational authorities plac-

F.2d at 43, and the interpretation of at least two additional circuits. *See Department of Educ. v. Katherine D.*, 727 F.2d 809, 813-14 (9th Cir. 1983) (the Act's requirements must be construed in light of the reality of limited public funding), *cert. denied*, 471 U.S. 1117 (1985); *Age v. Bullitt County Pub. Schools*, 673 F.2d 141, 145 (6th Cir. 1982) (need for free, appropriate education must be reconciled with state's need to allocate scarce funds among as many handicapped children as posible); *Doe v. Anrig*, 692 F.2d 800, 806-07 (1st Cir. 1982) (reality of limited public monies must be considered in reviewing placement decisions), *ovr'ld on other grounds, Doe v. Brookline School Comm.*, 722 F.2d 910, 917 (1st Cir. 1983); *see also Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443, 458 (3d Cir. 1981) (noting that mainstreaming in the instant case did not adversely affect state finances), *cert. denied*, 458 U.S. 1121 (1982).

We decline to construe the Act in the manner A.W. urges. To do so would tie the hands of local and state educational authorities who must balance the reality of limited public funds against the exceptional needs of handicapped children. To do so would also encourage the federal courts to ignore the Supreme Court's admonition that "[t]he primary responsibility for formulating the education to be accorded a handicapped

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ed the child in a self-contained classroom in a public school. Mark's parents contended that the Act's mainstreaming provision required that the state undertake to pay for their desired placement, as the private school provided Mark with greater opportunity for interaction with his non-handicapped peers. We did not disturb the state educational authorities' decision to place Mark in the less expensive alternative. *Id.* In *Springdale School District #50*, we again deferred to the judgment of the state educational authorities, although in *Springdale* the state educational authorities placed the child in a more expensive educational environment, requiring the local public school to furnish a special instructor. 693 F.2d at 41-42. We referred to the issue of cost, but held that cost did not justify overriding the decision of the state authorities. *Id.* at 43. A.W.'s placement at State School No. 2 was approved by both the local and state educational authorities. Thus, our result here does not conflict with our opinion in *Springdale*.

child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." *Rowley,* 458 U.S. at 207. We hold that the district court did not err in considering whether A.W. would benefit from placement in House Springs or in considering the cost to Northwest R-1 of such a placement.[9]

II.

A.W. and his parents also contend that the trial court erred in refusing to open and amend its judgment in light of additional evidence they sought to present via a motion under Rule 59 of the Federal Rules of Civil Procedure. This evidence consisted of affidavits which they argue showed that A.W. was making educational progress in a self-contained classroom at House Springs, thus indicating that his placement at House Springs would be appropriate under the *Rowley* standard. The local and state defendants opposed the Rule 59 motion and introduced their own affidavits which they argue support the conclusion that A.W. is making no progress at House Springs.

The decision to grant or deny a Rule 59 motion is committed to the sound discretion of the trial court. *Harris v. Arkansas Dep't of Human Servs.,* 771 F.2d 414, 416-17 (8th Cir. 1985); *Pitts v. Electro-Static Finishing, Inc.,* 607 F.2d 799, 803 (8th

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[9] A.W. develops at length in his brief an argument regarding the failure of Northwest R-1 to develop a continuum of alternative placements for handicapped children as required by 30 C.F.R. § 300-551. Appellant's Opening Brief at 19-29. Indulging in such a wide-ranging investigation into Northwest R-1's educational policies and facilities would go far beyond the scope of review of A.W.'s placement dictated by *Rowley, i.e.,* is A.W.'s placement at State School No. 2 "reasonably calculated to enable the child to receive educational benefits?" 458 U.S. at 207. As we observed in footnote 7, *supra,* A.W. and his parents do not seriously challenge the district court's determination that A.W.'s placement at State School No. 2 is otherwise appropriate.

Cir. 1979). In order for us to reverse the trial court's denial of this motion, A.W. and his parents must show us a clear abuse of this broad discretion. *Harris,* 771 F.2d at 417; *see Bond v. DMFS, Inc.,* 727 F.2d 770, 771 (8th Cir. 1984). We do not think that such a showing has been made.

We have examined the affidavits submitted by both parties. If we assume for the sake of argument that the evidence A.W. sought to bring to the trial court's attention *does* show that he is deriving some educational benefit at House Springs, we remain unpersuaded that the trial court abused its discretion in refusing to reopen its judgment. A.W.'s placement and his individual educational program are subject to periodic review pursuant to 20 U.S.C. § 1413(a)(1) and 34 C.F.R. § 300.34(d). Evidence of A.W.'s progress at House Springs may be brought to the attention of the local educational authorities at that time, and if the result is unsatisfactory to A.W. and his parents, administrative and judicial review of his placement is available. Therefore, the evidence was not "of such probative importance that its addition will prevent a miscarriage of justice from occurring." *Arthur Murray, Inc. v. Oliver,* 364 F.2d 28, 34 (8th Cir. 1966).

We affirm the judgment of the district court.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-350 C (2)

A.W., a minor by and through his Father and Next Friend, N.W., N.W. and S.W.,
Plaintiffs,

v.

Northwest R-1 School District, John Gibson in his capacity as Acting Superintendent of the Northwest R-1 School District, The Department of Elementary and Secondary Education, and State Board of Education, and Arthur L. Mallory in his capacity as Commissioner of the Department of Elementary and Secondary Education,
Defendants.

JUDGMENT

(Filed Feb. 3, 1986)

In accordance with the Memorandum filed this day and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendants shall have judgment against plaintiffs on all claims for relief in their complaint and plaintiffs' request for relief be and is DENIED. Parties to bear their own costs.

Dated this 3rd day of February, 1986.

/s/ Edward L. Filippine
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-350 C (2)

A.W., a minor by and through his Father and Next Friend, N.W., N.W. and S.W.,
Plaintiffs,

v.

Northwest R-1 School District, John Gibson in his capacity as Acting Superintendent of the Northwest R-1 School District, The Department of Elementary and Secondary Education, and State Board of Education, and Arthur L. Mallory in his capacity as Commissioner of the Department of Elementary and Secondary Education,
Defendants.

MEMORANDUM

(Filed Feb. 3, 1986)

This matter is here for a decision on the merits after trial to the Court. The Court adopts this entire memorandum as its findings of fact and conclusions of law.

This action arises from public education for a school-aged boy with Down's syndrome, A.W. The dispute centers around the appropriate placement for A.W.'s education. Plaintiffs, A.W., a minor, by and through his father and next friend, N.W., and A.W.'s parents argue that federal law requires A.W. to be educated in an environment that assures his interaction with nonhandicapped peers.

A decision in this case turns on the interpretation of the Education for All Handicapped Children Act, 20 U.S.C. §§1401-61 (EAHCA). EAHCA provides federal funds to the

states for education in return for compliance with the provisions of the Act. The issues in this case relate to EAHCA's requirements that the state assure that all handicapped children receive a free appropriate education, that handicapped children are educated with nonhandicapped children to the maximum extent appropriate, and that procedural rules designed to protect the rights of parents and children to be involved in decisions relating to the child's education are established. These procedural rules include the right to appeal decisions within the agency. As a final safeguard, EAHCA provides that after final agency review, disputes may be resolved in a civil action in the appropriate state court or the federal district court. 42 U.S.C. §§1412, 1415.

The parties agree that Missouri is the recipient of federal funds under EAHCA and that the Department of Elementary and Secondary Education (DESE) is the state agency primarily responsible for supervision of public elementary and secondary schools. DESE is under the State Board of Education. The Board's Commissioner, Arthur Mallory, has supervisory authority over DESE. Northwest R-1 School District (NWR-1) is the school district in which plaintiffs reside and seek education of A.W. John Gibson is the Superintendent of NWR-1. These entities and the individuals in their official capacities are the defendants in this action.

In May of 1980 A.W.'s mother attempted to enroll A.W. in NWR-1 at the House Springs Elementary School. Since A.W. has Down's syndrome, NWR-1 recommended that A.W. be schooled at a private institution referred to as the "mini-school". Later, NWR-1 referred A.W. to DESE for services. After additional testing DESE determined that A.W. was "severely handicapped" under Missouri law and therefore eligible for DESE services. See Mo.Rev.Stat. §162.725.1. DESE services meant, for A.W., education at State School Number Two in Mapaville (SS#2), a school designed for and which exclusively educates handicapped children.

A.W.'s parents objected to the segregated environment at SS#2 and challenged the classification of "severely handicapped" and placement in SS#2 through the procedural rules providing for agency appeals guaranteed by EAHCA and enacted in Mo.Rev.Stat. §§162.950, 162.961, 162.962.

At the level of review commonly known as the due process hearing, 20 U.S.C. §1415(a), the panel heard evidence on behalf of plaintiffs and NWR-1 and unanimously concluded that A.W. was "severely handicapped" and that this placement in SS#2 was inappropriate. DESE did not participate in the hearing as a party, although Jim Friedebach of DESE did appear as a witness. The evidence before the panel was further restricted since the panel declined to hear any evidence on the cost of instructing A.W. at House Springs Elementary as opposed to SS#2. The panel found that an appropriate program to meet A.W.'s need must include interaction with A.W.'s community and nonhandicapped peers.

Plaintiffs then requested review by the State Board of Education of part of the due process panel's decision, particularly the finding that A.W. was "severely handicapped" under Missouri law. On February 9, 1982, Paul Kinder, the person selected to review the due process panel's decision, affirmed the finding that A.W. was severely handicapped under Mo.Rev.Stat. §162.675(3) and that DESE was responsible for A.W.'s education. Kinder reversed the panel's decision regarding the appropriate placement of A.W. in SS#2 because the panel had exceeded its authority. After this last decision, plaintiffs brought this action under 20 U.S.C. §1415(e).

In October of 1984, this Court entered its memorandum and order remanding the action to NWR-1 and DESE in response to the state defendant's argument that the administrative procedure at the due process hearing level was inadequate because DESE was not a party. The Court found that DESE should have been notified of the due process hearing but was not. Ac-

cordingly, the Court remanded to allow the parties to correct these procedural deficiencies.

The parties, however, then stipulated that further administrative review would be futile, that the parties waived any claim that either had failed to exhaust administrative remedies, that the plaintiff waived any claim that they were not given a full and fair opportunity to be heard before an impartial tribunal at each level of review, that defendants waived any claim that they were not made parties to administrative review, and that the cause was ripe for a decision on the merits based on the administrative record below. The parties submitted full supplemental post-trial briefing and the matter is now before the Court for a decision on the merits.

Mo.Rev.Stat. §162.675(3) defines "severely handicapped children" as "handicapped children under the age of twenty-one years who because of the extent of the handicapping condition or conditions, as determined by competent professional evaluation, are unable to benefit from or meaningfully participate in programs in the public schools for handicapped children." The due process panel found that A.W. was "severely handicapped." This decision was affirmed by Paul Kinder. The Court finds that the preponderance of the evidence establishes that A.W. is severely handicapped within the meaning of Mo.Rev.Stat. §162.675(3).

The evidence at trial and at the due process hearing showed that A.W. functions within the range of severe mental retardation and has only minimal self-care abilities. He has difficulty dressing, using the restroom and washing himself. He must be closely supervised at all times and is sometimes disruptive. A.W.'s expressive ability is extremely limited, and he is very difficult to understand. His vocalizations generally entail expressions of only one or two words. A.W. lacks any real grasp of the abstract concept of numbers and has only partially mastered the alphabet. There has been extensive testing of A.W. for the

purpose of determining if A.W. comes within the classification of severely handicapped. DESE considers children "severely handicapped" when they function at or below one-half of the expected level of their peers. DESE utilizes numerous standardized tests; no one test is determinative. Considering all the available information and test results, A.W. clearly functions at or below one-half of the level expected of children of his age and is "severely handicapped" under Missouri law.

Classification of A.W. as "severely handicapped" is not outcome determinative in this action. As defendants admit, placement of A.W., although related to his classification, is a separate question. Options other than placement at a segregated state school exist. (Defendants' post-trial brief at 31.) Under federal and Missouri law handicapped children, including those "severely handicapped" as defined in Mo.Rev.Stat. §162.675(3), must be educated with nonhandicapped children.

20 U.S.C. §1412(5) provides, as a condition of state eligibility for federal funds, that the state must establish procedures to assure

> that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily,....

Missouri's analogous statute provides

> To the maximum extent practicable, handicapped and severely handicapped children shall be educated along with children who do not have handicaps and shall attend

> regular classes. Impediments to learning and to the normal functioning of such children in the regular school environment shall be overcome whenever practicable by the provision of special aids and services rather than by separate schooling for the handicapped.

Mo.Rev.Stat. §162.680.2.

In the case before the Court, plaintiffs assert that the preference for "mainstreaming" or educating the handicapped in the least restrictive environment reflected in §1412(5) requires that A.W. be educated in a self-contained classroom in the House Springs Elementary School so that A.W. can have the benefits of exposure to nonhandicapped children of his own age during lunch, recess and physical education, and the proximity of residence. Only in this setting, they argue, can A.W. receive an appropriate education required by EAHCA. Defendants maintain that SS#2 is the appropriate placement for A.W. notwithstanding the fact that it would not provide interaction with nonhandicapped peers.

A court considering a complaint filed under §1415(e)(2) "shall receive the record of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. §1415(e)(2). In making its decision, the Court is to give due weight to the state administrative decisions. *Board of Education v. Rowley,* 458 U.S. 176, 208 (1982).

In *Rowley,* the court set out a two-part analysis for cases brought under §1415. "[A] court's inquiry in suits brought under §1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits." *Id.* at 206.

In the case before the Court, the parties have by their stipulations waived the procedural claims they initially advanced. Accordingly, the first prong of the *Rowley* two-part test is not an issue in this case. As to the second part, the instant case differs from *Rowley* in that the mainstreaming provisions of EAHCA are at issue. See *Roncker v. Walter,* 700 F.2d 1058, 1062 (6th Cir. 1983), *cert. denied,* 464 U.S. 864 (1983).

As an initial matter, the Court must determine the limits of the mainstreaming requirement. The regulations of the Department of Education are instructive in this regard and are entitled to deference. *Irving Independent School Dist. v. Tatro,* 104 S.Ct. 3371, 3377 (1984). 34 C.F.R. §300.551 requires states to provide a continuum of services for the handicapped so that the least restrictive environment appropriate for the individual's education is available. Section 300.553 requires the participation of handicapped students with nonhandicapped students in nonacademic settings and extracurricular activities including meals and recess periods, to the maximum extent appropriate to the needs of the individual child. These regulations clearly contemplate the application of the "mainstreaming" concept to those students such as A.W. who cannot be placed in regular classrooms. The courts have followed this interpretation of the "mainstreaming" preference. See *Roncker v. Walter,* 700 F.2d at 1063; *Cothern v. Mallory,* 565 F.Supp. 701, 708 (W.D.Mo. 1983). *Cf. St. Louis Developmental Disabilities Treatment Center v. Mallory,* 591 F.Supp. 1416, 1444, n. 63 (W.D.Mo. 1984), (argument that mainstreaming under EAHCA may not extend beyond regular classroom may have merit), *aff'd* 767 F.2d 518 (8th Cir. 1985). This Court holds that the mainstreaming requirement extends beyond placement in regular classrooms.

The mainstreaming requirement, however, is not without limitation. There are circumstances when mainstreaming is not required. See *Rowley* at 181, n.4, (EAHCA provides for the education of some handicapped children in separate settings);

Stacey G. v. Pasadena Independent School District, 547 F.Supp. 61, 79 (S.D.Tex. 1982).

In a recent case in the Western District of Missouri, Judge Hunter recognized the limitation on the mainstreaming requirement and held that segregated educational settings for the handicapped such as SS#2 are not *per se* violations of EAHCA. *St. Louis Developmental Disabilities Treatment Center,* 591 F.Supp. at 1456. This Court agrees with Judge Hunter but recognizes that the issue before the Court in this case deals with EAHCA's requirements with regard to the specific needs of A.W.

In *Roncker* the court set out the factors to consider in determining the placement required by EAHCA's mainstreaming requirement.

> In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting. Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children. *See Age v. Bullitt County Schools,* 673 F.2d 141, 145 (6th Cir. 1982). Cost is no defense, however, if the school district has failed

> to use its funds to provide a proper continuum of alternative placements for handicapped children.

Id. at 1063.

Putting aside the questions of mainstreaming, it is clear that SS#2 provides an appropriate free education as defined by *Rowley*. The court there concluded that EAHCA did not require education designed to maximize the abilities of the particular child. Rather, EAHCA requires the provision of a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley* at 201.

As previously discussed, the evidence shows that A.W. functions as a severely retarded child with minimal self care abilities. His individual educational needs require instruction directed to helping A.W. function at a very basic level in society. SS#2 is specifically designed and built with this type instruction in mind. That facility, with its lower teacher/student ratios, provides intensive instruction with children of A.W.'s intellectual level. The building includes special facilities such as bathrooms adjacent to each classroom, and simulated settings that one encounters in everyday life such as a bedroom, a kitchen and grocery store. Therapy is also available to help A.W. with his speech deficiencies. These services are "reasonably calculated to enable the child to receive educational benefits."

The mainstreaming provisions require additional analysis. In addition to the requirement of a free appropriate education, EAHCA provides that handicapped children be educated with nonhandicapped to the maximum extent appropriate.

Under the facts and circumstances of the instant case and in light of the factors set out in *Roncker,* the Court is of the opinion that the mainstreaming provisions of EAHCA do not require the placement of A.W. in a self-contained classroom in the House Springs Elementary School.

In this regard the Court finds that because of A.W.'s severe retardation the exposure to nonhandicapped children if placed at House Springs would include only the opportunity to observe, rather than participate with, nonhandicapped children on the bus ride to school, at lunch, at recess and in activities such as physical education. The testimony of A.W.'s elementary school instructors at the due process hearing and at trial showed that A.W. has only limited interaction with others. The interaction that does exist is primarily directed to those to whom A.W. is close or particularly familiar. A.W. seldom mimics the behavior of other students. Further, although it would be physically possible to provide most of the SS#2 programs at House Springs Elementary, some of the special features of that school which would meet A.W.'s needs, the bathrooms adjacent to each room and the simulated grocery store, bedroom and kitchen, would not transfer to House Springs.

In light of the minimal benefit A.W. would receive from placement in House Springs, the Court finds that the placement is not feasible. The specific difficulty with placement at the House Springs School is that there is no teacher there who is certified to teach severely retarded children like A.W. The addition of a teacher is not an acceptable solution here since the evidence before the Court shows that the funds available are limited so that placing a teacher at House Springs for the benefit of a few students at best, and possibly only A.W., would directly reduce the educational benefits provided to other handicapped students by increasing the number of students taught by a single teacher at SS#2. The Court finds that although plaintiff presented evidence that A.W. might benefit from exposure to nonhandicapped peers, this possible benefit is insufficient to justify a reduction in unquestioned benefits to other handicapped children which would result from an inequitable expenditure of the finite funds available.

The Supreme Court in *Rowley* recognized the problem of limited funds. The Court quotes with apparent approval

language from *Mills v. Board of Education of District of Columbia,* 348 F.Supp. 866 (D.C.C. 1972), one of the two district court cases which acted as the impetus for the EAHCA.

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.

Rowley at 193, n. 15. See also *Department of Education, State of Hawaii v. Katherine D.,* 727 F.2d 809, 813 (9th Cir. 1983) (cost a factor); *Roncker* at 1063 (excessive spending on one child deprives other handicapped students); *Max M. v. Thompson,* 592 F.Supp. 1437, 1443 (N.D.Ill. 1983) (same); *Stacy G. v. Pasadena Independent School District,* 547 F.Supp. 61, 77 (S.D. Tex. 1982) (same). Cost does not excuse noncompliance with EAHCA's requirement that a basic floor of educational opportunity be provided. *Clevenger v. Oak Ridge School Board,* 744 F.2d 514, 517 (6th Cir. 1984). This, however, is not a situation where cost is advanced as an excuse for failure to provide a free appropriate education as the Court has found that SS#2 does provide the appropriate education.

Mainstreaming under EAHCA has been addressed by the Eighth Circuit. In *Springdale School District v. Grace,* 693 F.2d 41, 43 (8th Cir. 1982), *cert. denied,* 461 U.S. 927 (1983), the court concluded that the circumstances did not warrant a consideration of the costs to the school district in deciding to place a child in a regular public school instead of a segregated setting. Reference to the district court opinion, *Springdale School District v. Grace,* 494 F.Supp. 266 (W.D.Ark. 1980), shows that the facts differ markedly from the case at bar. In *Springdale,* the child was of above average intelligence but profoundly deaf. The placement at the segregated setting would have been a residential placement since the minor child's parents were mov-

ing 170 miles from the school. Further, the child there potentially could have participated with other nonhandicapped children in some classes as opposed to a mere opportunity to observe on the bus and at recess, lunch and physical education which is the case with A.W. These circumstances, the greater ability of the child to benefit from interaction with nonhandicapped peers and the removal from the home required by the segregated placement, set *Springdale* apart from the case at bar. Further, it is not clear from the district court's opinion that funds were limited in the same manner as in A.W.'s case.

Plaintiffs' remaining claims are without merit. As previously discussed, plaintiffs have waived any independent procedural due process claim they might have had by the joint stipulation filed after trial. Any other claim asserted uder §1983 is clearly unavailing in light of the decision in *Smith v. Robinson,* 104 S.Ct. 3457, 3468 (1984) (EAHCA precludes equal protection challenge to publicly financed education).

Plaintiffs' claim under §504 of the Rehabilitation Act of 1973 is also precluded by the availability of EAHCA as an avenue for relief. The Supreme Court opinions in *Smith v. Robinson,* 104 S.Ct. 3457 (1984) and *Irving Independent School District v. Tatro,* 104 S.Ct. 3371 (1984) make it clear that EAHCA provides the exclusive remedy for claims within its scope. Plaintiffs' complaint clearly asserts a claim for relief available under EAHCA and therefore an action under §504 is precluded. Plaintiffs further argue, however, that their claim comes within an exception to EAHCA's exclusivity since §504 places the burden of persuasion on the state on the issue of placement in the least restrictive environment. The court in *Smith v. Robinson,* 104 S.Ct. at 3474, stated that §504 claims would not be excluded in situations where "§504 guarantees substantive rights greater than those available under [EAHCA]." The Court is of the opinion that any shifting of the burden of persuasion that ay exist under §504 is not a greater substantive right which would bring the §504 clai within the exception recognized in *Smith.*

Finally, having determined that plaintiff is not entitled to relief, it is not necessary to reach the question of the availability of attorney's fees in this case.

Dated this 3rd day of February, 1986.

/s/ Edward L. Filippine
United States District Judge

APPENDIX C

STATE OF MSSOURI
DEPARTMENT OF ELEMENTARY
AND SECONDARY EDUCATION
P. O. BOX 480
JEFFERSON CITY, MISSOURI 65102

February 9, 1982

Mr. Robert J. Goodwin
Attorney at Law
Legal Services of Eastern Missouri, Inc.
625 North Euclid Avenue
St. Louis, Missouri 63108

Dear Mr. Goodwin:

On January 6, 1982, you asked for a state-level review of the findings of fact and conclusions reached by the hearing panel in its decision involving appropriate placement of A.W. You specifically requested review of the finding of the panel that A.W. is "severely handicapped" as that term is used in Section 162.675(3) RSMo., 1978. You also requested review of the panel's decision that the State Department of Elementary and Secondary Education is responsible for A.W.'s education.

After complete review of the transcript, findings of fact and conclusions reached by the panel, I am affirming the panel's decision regarding the two specific findings mentioned above.

The panel's decision regarding the inappropriateness of the placement of A.W. at State School No. 2 exceeded its authority and is set aside.

Sincerely,

/s/ Paul A. Kinder
Consultant for Special Education

rb

cc: State Board of Education
Commissioner Arthur Mallory
Mr. Louis Jerry Weber
Dr. Randy Dewar

APPENDIX D

DUE PROCESS HEARING DECISION
PANEL REVIEW

Child's Name: Aaron Warner

Birth Date: 12/27/74

Parents' Name: Mr. and Mrs. Noel Warner

Address: 4125 Willow Spring
House Springs, MO 63051

Telephone: 375-3563

School District:
Northwest R-I School District
House Springs, Mo.

Date of Hearing:
October 28, 1981

Hearing Officers:
Ms. Becky Blackwell
Ms. Gloria Makuh
Dr. Randy Dewar, Chairman

Attorneys: Mr. Robert Goodwin, Petitioner's attorney
Mr. Louis Jerry Weber, Respondent's attorney

Date that this decision was mailed to Petitioner, Respondent, Hearing Officers, and Department of Elementary and Secondary Education:

December 11, 1981

Due Process Hearing

Child: AW

School: Northwest R-I, House Springs, Missouri

List of Stipulations:

1. There is no need for sequestering.
2. The hearing will be a closed hearing.
3. Dr. Randy Dewar is the agreed upon chairman by both parties.
4. The IEP is not objected to by parents except for placement as of June 9, 1981.
5. It has been determined by competent professional evaluation that AW is a child who intellectually, linguistically and motorically is functioning within the severe range of mental retardation. Adaptive behavior falls within the upper limits of the moderate range of mental retardation. AW is handicapped and diagnosed as a child with Down's Syndrome.
6. AW is ambulatory and suffers from no apparent physical handicaps.
7. AW is currently attending school in the Northwest R-1 School District.
8. The Northwest R-1 School District has referred AW for education at State School #2.
9. DESE has indicated that AW would be accepted at State School #2.
10. State School #2 is attended solely by children with severe handicaps as that term is used in Missouri law, Section 162.675.

Purpose:

To contest the proposed placement of AW in State School #2.

Written Evidence Submitted:

All written evidence is attached to this decision except where the recipient of this report has already received copies.

LIST OF PARENTS' EXHIBITS

Witness List
P-1. IEP 6/9/91
P-2. IEP 4/1/81)
P-3. IEP 4/16/81) identical
P-4. Pupils Health and Enrollment Record P 2-3
P-5. Evaluation Summary 6/6/80
P-6. Clinical Audiologist's report 1/15/81
P-7. Diagnostic Evaluation submitted by Randall King
P-8. Pupil Evaluation Summary 12/16/81
P-9. Letter from Paul Bates to Robert Goodwin 7/27/81
P-10. Article authored by Paul Bates: "Characteristics of an Appropriate Education for Severely Handicapped Students"
P-11. Letter from Rex Wyrick to Robert Goodwin 4/16/81
P-12. Referral Form 10/23/80

LIST OF SCHOOL'S EXHIBITS

Witness List
Enrollment Record 5/1/80
Evaluation Authorization 5/30/80
Dr. Kilpatric's Report 8/8/80
Letter of Referral 9/3/80
Letter — Jose to Warner 9/4/80
IEP 9/15/80
Letter — DESE to Jose 9/29/80
Referral Form 10/20/80
Letter — DESE To Jose 12/15/80
Special Services Co-op
Pupil Evaluation Summary 12/16/81
Diagnostic Evaluation undated
Audiology Evaluation 1/15/81
Letter of Notification — DESE 1/22/81
Letter of Advisement — DESE 1/22/81
IEP 4/1/81

Summary Report 6/2/81
IEP 6/9/81
Letter — Jose to DESE (not enclosed) 6/10/81
Letter of Advisement — DESE 6/12/81
Notice of Rights — Jose to Warner 6/18/81
State Plan Exhibit A

List of Witnesses:

Petitioners

Ms. Susan Warner, Mother
Dr. Paul Bates, Assistant Professor

Respondents

Mr. James Friedebach, DESE
Ms. Lorna Roth, Kindergarten Teacher
Ms. Betty Edelman, Psychological Examiner
Ms. Paula Witkowski, Speech Pathologist
Mr. Greg Ferguson, Teacher
Mr. Gary Stephens, Principal
Dr. Jean Jose, Director, Special Education

Findings of Fact:

1. AW is a six year old male exhibiting characteristics diagnosed as Down's Syndrome (Petitioner's Exhibit P-4).

2. It has been determined by competent professional evaluation that AW is a child who intellectually, linguistically and motorically is functioning within the severe range of mental retardation (Petitioner's Exhibit P-7).

3. Adaptive behavior falls within the upper limits of the moderate range of mental retardation (Petitioner's Exhibit P-7).

4. AW is currently attending the Northwest R-1 School District at the House Springs Elementary School (Mr. Warner).

5. The education of AW in the regular classes provided by the local school district is not being achieved satisfactorily (Ms. Warner, Lorna Roth, Greg Ferguson, others).

6. The State Department of Elementary and Secondary Education has assigned AW to State School #2 in Mapaville (Respondent's Exhibit "Letter of Notification — DESE".

7. State School #2 is attended solely by children who are severely handicapped (James Friedebach).

8. AW needs a full-day program (Ms. Warner).

9. AW needs a small classroom placement with increased special education services (Ms. Warner, Ms. Roth, Mr. Ferguson, others).

10. AW needs continued interaction with non-handicapped peers (Dr. Bates).

11. "B. The Department provides each local school district copies of state regulations governing the operations of special education programs. The 'Procedural Safeguards' as required by state and federal law for operation of this program are contained within this document directly or by reference." (Respondent's Exhibit A, State Plan, P. 95).

12. "The State Department of Elementary and Secondary Education defines the severely handicapped as: children under the age of twenty-one years who, because of the extent of the handicapping condition or conditions, as determined by competent professional evaluation, are generally unable to benefit from or meaningfully participate in programs in the public school for handicapped children." (Respondent's Exhibit A, State Plan P. 187).

13. "Thompson (1974 P. 73) — a severely handicapped child is defined as one who because of the intensity of his physical,

mental or emotional problems or a combination of such problems, needs educational, social, psychological, and medical services beyond these which have been offered by traditional, regular, and specialized educational programs, in order to maximize his full potential for useful and meaningful participation in society and for self fulfillment." (Petitioner's Exhibit P-10).

14. The Thompson definition stated above fits AW. (Dr. Bates).

15. AW is severely handicapped according to the State Plan. (Respondent's Exhibit A).

16. The Thompson (1974) definition and the State Plan definition are not discrepant. (James Friedebach).

17. The responsibility for providing appropriate educational services for severely handicapped children and youth (not residents of a special school district) rests with the State Board of Education." (Respondent's Exhibit A, State Plan, P. 187).

18. AW has benefited from interaction with non-handicapped peers. (Petitioner's Exhibit 5).

19. On the continuum of services available in Missouri, the state schools are more restrictive than many other settings.

Rationale

The panel can only make findings which relate to the question, "Is the proposed placement of AW in State School #2 appropriate?" This finding must be based on regulations, law, and the facts as presented during the hearing.

The panel does not have the authority to direct the local school district to do more than that required by law.

The parties stipulated that AW is severely handicapped. Witnesses called by both parties supported the diagnosis of

"severely handicapped". Furthermore, AW has been accepted by the Department of Elementary and Secondary Education as severely handicapped.

A review of the State Plan (Respondent's Exhibit A) clearly defines the responsibility to educate the severely handicapped as a Department of Elementary and Secondary Education responsibility.

The Respondent did not suggest what the content of a program for AW should be. The petitioner did present testimony describing an appropriate program.

Mr. Friedebach was the only witness representing the State School system. He was not familiar with the programs at State School #2. *No witness was called to represent the programs offered or educational opportunities available at the State School.*

The appropriate program to meet AW's individual needs must include interaction with AW's community and interaction with non-handicapped peers.

The State School #2 is segregated by enrollment and it is physically isolated.

Modifications of the State School program and cooperative attempts between the state schools and other agencies have been arranged with success in the past.

With this rationale in mind, the panel renders the opinion stated below.

Decision

By unanimous vote, the panel finds that the Department of Elementary and Secondary Education is responsible for the education of AW. Furthermore, the proposed placement of AW at State School #2 is found *not to be appropriate.*

The panel recommends:

1. The re-writing of AW's IEP for clarification so that an appropriate placement can be arranged.

2. That the local school district should apply for special CSPD funds from the state director of Special Education, Department of Elementary and Secondary Education for improved services to AW during the interim period between receipt of this decision and appropriate placement.

3. That the Department of Elementary and Secondary Education should assume the leadership in service during the interim between receipt of this decision and appropriate placement. This could include:

   A. Immediate technical assistance.

   B. Provision of a full-time or part-time classroom aide.

   C. Alteration of AW's current schedule of instruction to allow more special education services.

   D. Participation in re-writing the IEP.

4. Considering the time already spent in due process and the inappropriateness of AW's current placement, an appropriate placement should be arranged in a timely manner.

Appeal Procedures:

Both Petitioner and Respondent have the right to review this report and within 30 days of receipt make a written request for review by the State Board of Education. Address such a request to:

Dr. Leonard Hall, Assistant Commissioner
State Department of Education
P. O. Box 480
Jefferson City, MO 65102

If neither party request such review, the decision of the hearing panel shall be final.

Becky Blackwell
Hearing Officer

Gloria Makuh
Hearing Officer

/s/ R. L. Dewar
Hearing Officer and Chairman

Date: December 11, 1981

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1541-EM

A.W., a minor by and through his Father and Next Friend, N.W.; N.W. and S.W.,

Appellants,

vs.

Northwest R-1 School District, et al.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

JUDGMENT

(Filed March 6, 1987)

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of this Court.

March 6, 1987

The State appellees will recover from appellants the sum of $165.40.

Appellees, Northwest R-1 School District and John Gibson, will recover from appellants the sum of $98.28.

A true copy:

ATTEST: /s/ Robert D. St. Vrain

CLERK, U. S. Court Of Appeals, Eighth Circuit.

MANDATE ISSUED — 4/16/87

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1541-EM

A. W., etc., et al.,
Appellants,

vs.

Northwest R-1 School District, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

April 8, 1987

Order entered at the Direction of the Court:

/s/ Robert D. St.Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX G

FEDERAL STATUTES AND REGULATIONS INVOLVED

Federal Statutes

20 U.S.C. § 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that —

> (A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;
>
> (B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the Stat not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be in-

consistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the

education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

20 U.S.C. § 1414. Application

Requisite features

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall —

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which —

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including—

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 1412 (5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that (A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this

subchapter (i) shall be used to pay only the excess costs directly attributable to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this subchapter;

(3)(A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of handicapped children participating in programs carried out under this subchapter; and

(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subclause (A);

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each

school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C) and 1415 of this title.

(b) Approval by State educational agencies of applications submitted by local educational agencies or intermediate educational units; notice and hearing

(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Secretary under section 1413(c) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educa-

tional agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall —

(i) make no further payments to such local educational agency or such intermediate educational unit under section 1420 of this title until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of section 1416(a) of this title shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

Consolidated applications

(c)(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c)(4)(A)(i) of this title or such local educational agency would be unable to establish and main-

tain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 1411(d) of this title if an individual application of any such local educational agency had been approved.

(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this subchapter.

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this subchapter, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

Special education and related services provided directly by State educational agencies; regional or State centers

(d) Whenever a State educational agency determines that a local educational agency—

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

Reallocation of funds

(e) Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

Programs using State or local funds

(f) Notwithstanding the provisions of subsection (a)(2)(B)(ii) of this section, any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used

to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

Federal Regulations

DIRECT SERVICE BY THE STATE EDUCATIONAL AGENCY

34 C.F.R. § 300.360 Use of local educational agency allocation for direct services.

(a) A State educational agency may not distribute funds to a local educational agency, and shall use those funds to insure the provision of a free appropriate public education to handicapped children residing in the area served by the local educational agency, if the local educational agency, in any fiscal year:

(1) Is entitled to less than $7,500 for that fiscal year (beginning with fiscal year 1979);

(2) Does not submit an application that meets the requirements of §§ 300.220-300.240;

(3) Is unable or unwilling to establish and maintain programs of free appropriate public education;

(4) Is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain those programs; or

(5) Has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements of paragraph (a) of this section, the State educational agency may provide special educa-

tion and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements under §§ 300.182-300.186 do not apply to the State educational agency.

34 C.F.R. § 300.361 Nature and location of services.

The State educational agency may provide special education and related services under § 300.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the least restrictive environment provisions in §§ 300.550-300.556 of Subpart E).

34 C.F.R. § 300.370 Use of State educational agency allocation for direct and support services.

(a) The state shall use the portion of its allocation it does not use for administration to provide support services and direct services in accordance with the priority requirements under §§ 300.320-300.324.

(b) For the purposes of paragraph (a) of this section:

(1) "Direct services" means services provided to a handicapped child by the State directly, by contract, or through other arrangements.

(2) "Support services" includes implementing the comprehensive system of personnel development under §§ 300.380-300.388, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to a free appropriate public education for handicapped children.

34 C.F.R. § 300.371 State matching.

Beginning with the period July 1, 1978 - June 30, 1979, and for each following year, the funds that a State uses for direct and support services under § 300.370 must be matched on a program basis by the State from funds other than Federal funds. This requirement does not apply to funds that the State uses under § 300.360.

34 C.F.R. § 300.372 Applicability of nonsupplanting requirement.

Beginning with funds appropriated for Fiscal Year 1979 and for each following Fiscal Year, the requirement in section 613(a)(9) of the Act, which prohibts supplanting with Federal funds, does not apply to funds that the State uses from its allocation under § 300.706(a) of Subpart G for administration, direct services, or support services.

LEAST RESTRICTIVE ENVIRONMENT

34 C.F.R. § 300.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 300.550-300.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 300.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 C.F.R. § 300.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement: (1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under § 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

34 C.F.R. § 300.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extra-curricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.306 of Subpart C, each public agency shall insure that each handicapped child participates with non-handicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

34 C.F.R. § 300.554 Children in public or private institutions.

Each State educational agency shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that § 300.550 is effectively implemented.

34 C.F.R. § 300.555. Technical assistance and training activities.

Each State educational agency shall carry out activities to insure that teachers and administrators in all public agencies:

(a) Are fully informed about their responsibilities for implementing § 300.550, and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

34 C.F.R. § 300.556 Monitoring activities.

(a) The State educational agency shall carry out activities to insure that § 300.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 300.550 of this subpart, the State educational agency:

(1) Shall review the public agency's justification for its actions, and

(2) Shall assist in planning and implementing any necessary corrective action.